STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2006
v	No. 260957 Wayne Circuit Court
JOHNNY B. CALDWELL, Defendant-Appellant.	LC No. 01-004126-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a short-barreled rifle, MCL 750.224b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was sentenced to consecutive terms of one to five years' imprisonment for his possession of a short-barreled rifle conviction and to two years' imprisonment for his felony-firearm conviction. We affirm, but remand to the trial court for the limited purpose of correcting defendant's presentence investigation report (PSIR).

Defendant first argues that his convictions where against the great weight of the evidence and that the prosecution failed to present sufficient evidence to prove the elements of felony-firearm and possession of a short-barreled rifle beyond a reasonable doubt. We disagree.

Defendant properly preserved the issue that his convictions were against the great weight of the evidence by raising it in a motion for a new trial. *People v Musser,* 259 Mich App 215, 218; 673 NW2d 800 (2003). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 218-219. Additionally, claims of insufficient evidence are reviewed de novo. *People v Hawkins,* 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court views the evidence in the light most favorable to the prosecutor

[1] Defendant was previously charged with entry without permission, MCL 750.115, possession of a short-barreled rifle, and felony-firearm. At his first trial, defendant was convicted of entry without permission; however, the jury was deadlocked on both the possession of a short-barreled rifle and felony-firearm charges. At his second trial, defendant was convicted on both remaining charges. Defendant appeals as of right his convictions and sentences from his second trial.

and determines whether any rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

"A person shall not manufacture, sell, offer for sale, or possess a short-barreled shotgun or a short-barreled rifle." MCL 750.224b(1). A "short-barreled rifle" is defined as "a rifle having 1 or more barrels less than 16 inches in length or a weapon made from a rifle, whether by alteration, modification, or otherwise, if the weapon as modified has an overall length of less than 26 inches." MCL 750.222(k). "Felony-firearm is the crime of carrying or possessing a firearm during the commission or attempted commission of a felony." *People v Moore*, 470 Mich 56, 58; 679 NW2d 41 (2004).

The prosecution presented sufficient evidence from which the jury could conclude that defendant possessed a short-barreled rifle. Jason Foy testified that he saw that defendant was holding a "long gun" when he walked behind defendant up the stairs. Further, Foy told defendant that he could hide the gun in his sister's room underneath the dresser. Foy testified that he last saw defendant enter his sister's room with the gun. After defendant surrendered to police, a sweep of the house by officer George Chester revealed a "pistol grip" .30 caliber Carbine rifle protruding from underneath a dresser in Foy's sister's room. At trial, Chester identified the weapon and measured the length of the gun from the tip of the barrel to the end of the "butt portion" of the grip and noted that the length was 19 inches. Officer Elvin Barren testified that Chester turned the rifle over to him after the sweep of the house and described the weapon as a pistol grip "short-barreled rifle." Further, Barren testified that the short-barreled rifle was "brown" and that the "stock" of the rifle was "cut." Officers Chester, Barren and Kimberly Seely all referred to the rifle as a "pistol grip." Their testimony indicated that the rifle had been modified or altered by removing the stock so that the pistol grip was the only remaining portion on the end of the firearm.

Viewing the foregoing evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to prove that defendant possessed a rifle that was less than 26 inches in total length and that the possession charge constituted the underlying felony for the felony-firearm charge. Moreover, defendant has failed to show that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Musser, supra* at 218-219.

Defendant next argues that he was denied his state and federal Constitutional rights to confront Foy when the trial court determined that Foy was unavailable as a witness and admitted the transcripts of Foy's testimony from defendant's preliminary examination and previous trial. Additionally, defendant contends that the trial court erred in determining that the prosecutor exercised due diligence in attempting to locate Foy prior to defendant's second trial and that a missing witness jury instruction was not required. We disagree with both arguments.

Defendant failed to preserve the confrontation issue by objecting at trial based on the alleged constitutional violation and raising the same issue on appeal. *People v Geno*, 261 Mich App 624, 629-630; 683 NW2d 687 (2004). Unpreserved allegations of constitutional error are reviewed for plain error on appeal. *Id.* at 630, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, this Court reviews a trial court's determination of due

diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Under the Confrontation Clause of the Sixth Amendment, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Here, Foy's testimony at defendant's first trial implicated defendant as the person who committed the charged offenses. Moreover, the Supreme Court has held that testimony at a preliminary examination is "testimonial in nature." *Id.* at 51-52. Hence, Foy's testimony at defendant's preliminary examination and first trial was testimonial and, therefore, could not be admitted unless Foy was unavailable and defendant had a prior opportunity to cross-examine him.

Unavailability as a witness includes situations in which the declarant is absent and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means, and in a criminal case, due diligence is shown. *People v Bean*, 457 Mich 677, 684-685; 580 NW2d 390 (1998). The party attempting to admit the former testimony must demonstrate that a reasonable, good-faith effort was made to secure the declarant's presence at trial. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). The test for due diligence "is one of reasonableness and depends upon the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684.

In the present case, the record indicates that defendant failed to move for a due diligence hearing before defendant's second trial. However, before voire dire, defendant objected to the introduction of the transcript of Foy's testimony from defendant's first trial. The prosecution proceeded to outline its attempts to locate Foy, which included: (1) sending a police officer and an investigator employed by the Wayne County Prosecutor's office to Foy's last known address; (2) contacting Foy's paternal aunt and Foy's father, both of whom failed to respond to the prosecution's inquiries; and (3) reviewing Foy's juvenile file for his last known address. Based on this, the trial court concluded that the prosecutor made "reasonable efforts" to locate Foy before trial and that the prosecutor and defense counsel at defendant's preliminary examination and first trial had a "full opportunity" to cross-examine Foy. Further, the trial court allowed the prosecutor to introduce transcripts of Foy's testimony at defendant's previous trial and preliminary examination. Based on the record presented, we conclude that the trial court did not abuse its discretion in concluding that the prosecutor made diligent good-faith efforts in an attempt to procure Foy's live testimony at defendant's second trial.

Defendant also had an opportunity and similar motive to develop Foy's testimony at the preliminary examination and at defendant's first trial. The record reveals that defendant effectively cross-examined Foy at the preliminary examination. Further, defendant's first and second trial involved the same issues, i.e., whether Foy properly identified that defendant was holding a short-barreled rifle. The record also reveals that defendant effectively cross-examined Foy during defendant's first trial regarding his identification of the weapon. Accordingly, we conclude that defendant had an opportunity and similar motive to develop the testimony of Foy at defendant's preliminary examination and first trial. Therefore, the trial court properly

admitted the transcripts pursuant to MRE 804(b)(1) and defendant's right to confront Foy was not violated. *Crawford, supra* at 53-54.

Finally, a missing witness jury instruction was not required. The missing witness jury instruction allows the jury to infer that a missing witness's testimony would have been unfavorable to the prosecution's case. CJI2d 5.12. Because the trial court properly found that the prosecutor exercised due diligence and submitted the transcripts of Foy's testimony to the jury, the missing witness jury instruction was not required. *Eccles, supra* at 388-389.

Defendant next argues that the Presentence Investigation Report (PSIR) contained prior felony and misdemeanor convictions that were not committed by defendant. We agree, but find that these convictions were not used to determine defendant's sentence.

This Court reviews the sentencing court's response to a claim of inaccuracies in defendant's PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

"A judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). "The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges." *Spanke, supra* at 648. Generally, a sentencing court may: (1) determine the accuracy of the information; (2) accept the defendant's version; or (3) simply disregard the challenged information. *Id*. "Should the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence." *Id*. If the court finds that the challenged information is inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. MCL 771.14(6); *Spanke, supra* at 649. However, if a trial court does not rely on the challenged information in sentencing a defendant, resentencing is not required. *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

In the present case, the PSIR indicates that defendant has 13 prior felony convictions and 12 prior misdemeanor convictions. At sentencing, defense counsel noted that she had reviewed the PSIR and stated that the PSIR inaccurately listed defendant's prior felony and misdemeanor convictions. Defense counsel said that defendant only had two prior felony convictions, two subsequent felony convictions and one prior misdemeanor conviction. The record reveals that the trial court agreed with defense counsel regarding the inaccuracies contained in the PSIR. Further, the trial court only considered defendant's two prior felony convictions, two subsequent felony convictions and one prior misdemeanor conviction when it calculated defendant's guidelines minimum range. Accordingly, because the trial court agreed that the information contained in defendant's PSIR was inaccurate and did not consider the alleged inaccuracies in determining defendant's sentence, we conclude that remand for resentencing is unnecessary. *Harmon, supra* at 533. However, we remand to the trial court for the limited purpose of correcting defendant's PSIR. MCL 771.14(6); *Spanke, supra* at 649.

Defendant next argues that the trial court incorrectly calculated the amount of jail credit that defendant was entitled to receive. We disagree.

Whether a defendant received the proper amount of credit for time spent in jail is a question of law. See *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). Questions of law are reviewed de novo on appeal. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998).

Defendant relies on MCL 769.11(b) to support his contention that he is entitled to receive credit for the time that he was jailed for an out-of-state probation violation between his first and second trials. MCL 769.11(b) provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Application of the sentencing credit provision in MCL 769.11b is mandatory. *People v Seiders*, 262 Mich App 702, 706; 686 NW2d 821 (2004). However, MCL 769.11b does not entitle a defendant to credit for time served before sentencing if he is incarcerated for an offense other than that for which he is ultimately convicted, or for other unrelated reasons. *Id.* at 706-707. "A defendant is only entitled to a sentencing credit under MCL 769.11b if he has been '*denied or unable to furnish bond.*'" *Id.* at 707 (emphasis in original).

Here, defense counsel argued at sentencing that defendant served time in jail for "nine and a half months" in Tennessee between his first and second trials. Defense counsel indicated that defendant was jailed for a probation violation that occurred in Tennessee. The PSIR and the judgment of sentence indicate that defendant was awarded credit for 264 days of jail time that defendant served while in custody at the Wayne County Jail pending resolution of defendant's first and second trials. However, the PSIR is devoid of any indication that defendant served time in jail in Tennessee between defendant's first and second trials. Regardless, defendant's alleged time in jail in Tennessee for a Tennessee probation violation would not entitle defendant to sentence credit in Michigan because it was for an offense other than that for which he was ultimately convicted. *Id.* at 706-707. On the record presented, defendant has failed to show that he was entitled to any additional jail credit for his possession of a short-barreled rifle conviction or felony-firearm conviction. Moreover, the trial court correctly concluded that defendant was entitled to receive 264 days' credit for the collective time that defendant spent in Wayne County Jail pending defendant's trial on the instant charges and the time defendant spent in jail pending his first trial.

Defendant finally argues that his convictions violate the state and federal constitutional prohibitions against double jeopardy. We disagree.

Pursuant to both the United States and Michigan Constitutions, the state may not place a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004). "'Where the issue is one of multiple punishment rather than successive trials, the double

jeopardy analysis is whether there is a clear indication of legislative intent to impose multiple punishment for the same offense.'" *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), quoting *People v Mitchell*, 456 Mich 693, 695-696; 575 NW2d 283 (1998). If the Legislature clearly intended to impose multiple punishments for the same offense, there is no double jeopardy violation. *Id.* at 378.

In *Mitchell*, *supra* at 698, our Supreme Court concluded that "the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute." Because MCL 750.224b is not one of the felony exceptions, see MCL 750.227b(1), defendant could constitutionally be given cumulative punishments when charged and convicted of both possession of a short-barreled rifle and felony-firearm. See *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003).

Affirmed, but remanded to the trial court for the limited purpose of correcting defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray